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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 5

FRANK JAMES LUPPER, *et al* ..... *Petitioners*

v.

THE STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 432

FRANK JAMES LUPPER, *et al* ..... *Petitioners*

v.

THE STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas (Appendix of Petition) is reported at 236 Ark. 596, 367 S.W. 2d 750 and the opinion of that court on petition for rehearing (Appendix of Petition) is found at 367 S.W. 2d 760.

JURISDICTION

The jurisdictional requirement is adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the enforcement of a criminal statute pertaining to trespass by the State of Arkansas comes within the purview and is violative of the Fourteenth Amendment of the Constitutionn of the United States.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

ARKANSAS STATUTE INVOLVED

The issue of this litigation is the constitutionality of Act 14, Acts of Arkansas of 1959, codified as Arkansas Statutes Annotated §41-1433 (1961 Supp.) which prohibits a person to remain on the premises of a business establishment after having been requested to leave by the owner or manager of the establishment.

STATEMENT

The petitioners, Frank J. Lupper and Thomas B. Robinson, were prosecuted and convicted for the violation of trespass which occurred at a privately owned business establishment in Little Rock, Arkansas.

Aside from certain controversial aspects, the statement contained in the Petition is a fair and concise summary of the circumstances surrounding the incident.

It should suffice for purposes here to note that petitioners were a part of a group of 12 to 15 persons wearing badges who entered Gus Blass & Company, a department store, at noon on April 13, 1960. The group proceeded to the mezzanine tea room where petitioners and some others of the group sat down at the counter and tables. Within a few minutes, both petitioners were advised by store officials, the manager and assistant superintendent, that Blass reserved the right to refuse service to anyone and was not prepared to serve petitioners. The petitioners were then requested to leave. Although the petitioners were not boisterous, they attempted to argue with the store personnel and refused to leave the premises. The city police were summoned and the petitioners were arrested for violation of Act 14 of the Acts of Arkansas of 1959, codified as Arkansas Statutes Annotated §41-1433 (1961 Supp.).

The petitioners were tried and convicted of the offense in the Criminal Division of the Little Rock Municipal Court. The convictions were appealed to Pulaski Circuit Court where a trial de novo by jury resulted in verdicts of guilty. The Arkansas Supreme Court affirmed the convictions and subsequently denied petitioners' application for rehearing.

ARGUMENT

Respondent submits that the petition does not disclose any substantial issue and the record in this case fails to support the conclusion of deprivation of any right made available by either the Constitution of the United States or the Constitution of Arkansas. The convictions affirmed by the Arkansas Supreme Court are in concert with both the spirit and letter of the most recent decisions rendered by this Court and the fundamental principles of the common law.

In order to facilitate both brevity and clarity of the questions, respondent has attempted to follow the organization of petitioners' brief as closely as possible.

I

Act 14 is Constitutional as Enacted and Applied

A. The Convictions Rest Upon Evidence of Trespass

Initially petitioners argue that their convictions constitute nothing more than racial discrimination. During their trial, they steadfastly maintained that, without any preconceived arrangement, each had individually decided to go to Blass to have lunch. Thus, pure happenstance brought approximately twelve students wearing identifying badges from a local college to the doors of a department store simultaneously to flood the mezzanine tea room. This visit was apparently the first for each of the group. It was no wonder that the prosecutor expressed some skepticism when the petitioners denied having any knowledge of the identity of any of the others in

the demonstration. The evidence adduced at trial was not only beyond a reasonable doubt as to each essential element of the offense; it was overwhelming.

To support their contention, petitioners rely entirely upon a quoted portion of the testimony of the manager of Blass with the erroneous conclusion that the only reason the petitioners were asked to leave was that they were Negroes (p. 8 of Petition). The one compelling reason expressed by the manager was that he did not "want any disturbance" (R.65). In answer to petitioners' question concerning *Shelley* v. *Kraemer*, 334 U.S. 1, a store manager having a public disturbance in the store whether it be caused by a group of Negroes or Caucasians is more disagreeable than having a Negro as a neighbor or eating with a Negro. The record in this case discloses that a disturbance was well under way involving both ethnic groups which was just what the manager was seeking to avoid. Since it was the demonstrators' avowed purpose to cause a disturbance, the manager's action was not only reasonable, but laudable.

B. The Private Prerogative

Conceding *arguendo* that the basis of the exclusion of petitioners by Blass was solely race, there was no violation of constitutional rights. It is well settled that an individual may discriminate as he sees fit. *The Civil Rights Cases*, 109 U.S. 3; *Burton* v. *Wilmington Parking Authority*, 265 U.S. 715; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir.); *Griffin* v. *Collins*, 187 F. Supp. 149; *Avent* v. *North Carolina*, 373 U.S. 375; *Gober* v. *City of Birmingham*, 373 U.S. 277; *Lombard* v. *Louisiana*, 373 U.S. 267; *Peterson* v. *City of Greenville*, 373 U.S. 244.

C. State Action

It is conceded that probably most discrimination by government is not valid. *Brown* v. *Board of Education*, 347 U.S. 483; *Buchanan* v. *Warley*, 245 U.S. 60; *Cooper* v. *Aaron*, 358 U.S. 1; *Peterson* v. *City of Greenville*, *supra*. The critical question posed is: Has the State of Arkansas enforced racial discrimination? The answer appears as obvious to respondent as it does to petitioners although contrary conclusions are reached.

First, the doctrine of *Shelley* cannot be invoked to control the issue in controversy, for there is no legal or factual analogy with the case at bar. It is certainly doubtful that *Shelley* will ever be overruled, but the holding there will not be diminished in any respect if petitioners' convictions are allowed to remain undisturbed. Petitioners compare *Shelley*, at page 9 of the Petition, by asking who would think that a state court could require specific performance of a restaurateur who wanted to desegregate in derogation of an agreement of all of the restaurateurs in the community to remain segregated. To point the falicy of this, it would not be proper for that state court, or a federal court for that matter, to order specific performance in compliance to an agreement to integrate by a restaurateur who desired to remain segregated.

Second, the fact that these cases are the result of criminal prosecutions is of no avail to petitioners. The American system of jurisprudence without variance fixes the responsibility of law enforcement on the peace officer, prosecutor, attorney general, the courts and finally the public itself. The State of Arkansas is no different and it would not be of any benefit to cite and relate here the authority for these fundamental matters.

D. The Crime

These cases which are the concern of the application before this Court do not involve a delicate balancing of opposing constitutional rights. The foundation of these convictions rest rather on the universally recognized elementary principle of trespass. This Court aptly stated in *Martin* v. *Struthers*, 319 U.S. 141, at 147:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

The Arkansas Statute, §41-1433, *supra*, is merely a codification of the common law rule of trespass. See *Carpenter* v. *State*, 62 Ark. 286, 36 S.W. 900; *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295.

In answer to the contention made by petitioners that the statute is discriminatory, the Arkansas Supreme Court observed that the law is not restricted to Negroes. Appendix to Petition, 8a, 9a.

Unquestionably, petitioners have made a persuasive argument that the application and enforcement of the statute has the result of fostering racial exclusionary practices. Respondent submits, however, that it is clear that such a disappointing result is purely incidental and subservient to the greater right of freedom of choice of the individual, not the majority or minority, which must be predominate of all other rights. If this were not so there could be no other rights, in practice or theory, for all rights would be nullified by the abolition of the one of choice since all other freedoms derived their life breath from choice alone.

E. Burden of Proof

Petitioners interject, for the first time in their petition that the burden of proof should have rested with the State of Arkansas to demonstrate there was no connection between so-called custom and state sanctions supporting customs. See Petition pp. 12-16.

There was neglect on the part of petitioners to raise this matter below so that the trial court and the Arkansas Supreme Court might have an opportunity to properly rule on the question. Local procedure in a criminal case requires that objection be made, exception taken, and the matter included in the motion for new trial. *Yarbrough* v. *State*, 206 Ark. 549, 176 S.W. 2d 702. Moreover, in a misdemeanor, only issues briefed can be properly considered. Rules of Ark. Sup. Court, Rule 11 (g). Reasonable procedural requirements created to facilitate the dispatch of justice have been honored by this Court. *Edelman* v. *California*, 344 U.S. 357; *Brown* v. *Allen*, 344 U.S. 443, 503.

Inasmuch as petitioners failed to comply with the long established rules of the courts of Arkansas, they cannot now be heard.

II

There are no Special Circumstances of Police Involvement to Constitute State Action

At Point II of the Petition, it is asserted that there were special circumstances involving the police which established the "State action" requirement which would place the case at bar within the purview of the Fourteenth Amendment. On the contrary, respondent submits that the record is totally void of any evidence, expressed or inferred, which would support such an argument.

The sole basis of petitioners' contention rests upon the testimony of Officer Baer who related at trial that while he was working in the vicinity of the Blass store, he observed and followed the group into Blass to a position where he saw them taking seats in the mezzanine restaurant area, and then notified headquarters. The officer further testified that he incidentally talked to a store employee while the demonstrators sat down (R.53). Just how, by conversing with an unknown employee, the officer could insure that a particular offense would be governed by a particular statute is not revealed or explained by petitioners. Rather than benefit this argument with even a speculative theory, petitioners are content to remain mute on this subject.

It must be noted that Officeer Baer's station was in a congested business district at the intersection of Main and Fourth Streets where Worthen Bank, one of Arkansas' largest financial institutions, Blass and Woolworth's are located (R.66). It would not seem unusual that a policeman would be on duty in that area at the time the offenses were committed. Moreover, the rather large group divided and entered separate entrances on Fourth Street and Main Street wearing badges. This would attract the attention of a less astute person, and in fact, succeeded in drawing a curious crowd (R.55,67). One of the petitioners had obviously gained some noteriety for the officer recognized him as a demonstrator (R.51).

It was not unreasonable that the situation demanded police scrutiny since petitioners did argue with store personnel, created a crowd, and refused to leave the dining area after they had been requested to do so (R.65). It most certainly would have been unreasonable for the police to have ignored the summons for assistance by the store. But petitioners would have the police to abandon

their responsibility and remain in the street. In other words petitioners insist that the police should have stayed out where they had been invited in and the petitioners should have been permitted to stay in even though they had been asked to leave. To say the least, such an argument is absurd and incomprehensible.

In conclusion, respondent agrees with the statement at page 18 of the petition that the situation presented in the instant cause "is a far cry from the mere neutral use of state machinery" found in *Lombard* v. *Louisiana, supra*, and *Peterson* v. *City of Greenville, supra.* In the absence of such proof, there can be no merit to the petitioners' submission of error.

CONCLUSION

The petitioners have entirely failed to substantiate one area of their petition to either logic or law. In fact, reason demands and the pronouncement of this Court governing the issues in controversy confirm, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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